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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

FILED

DEC 27 2006

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)
)
) Case No. 05-29937-B-7
ISAAC CHAVEZ, JR.,)
) D.C. No. MAR-3
)
Debtor.) Submitted November 21, 2006
)
)

MEMORANDUM DECISION

By this motion (the "Fee Application"), Mariam S. Marshall, Esq. of Marshall & Ramos, LLP ("Applicant"), counsel for the chapter 7 trustee, seeks approval of attorney's fees and costs totaling \$33,504.90. The debtor's opposition is sustained in part and overruled in part. The opposition of The Golden 1 Credit Union is overruled. The Fee Application is granted in part and denied in part. Fees are approved in the amount of \$262.00, and costs are approved in the amount of \$63.88, for a total of \$325.88 to be paid as an administrative expense by the chapter 7 trustee. Fees of \$17,945 and costs of \$641.01 (\$18,586.01 total) are denied. Fees of \$14,063 and costs of \$530.01 (\$14,593.01 total) are denied without prejudice under In re Shirley, 134 B.R. 940 (B.A.P. 9th Cir. 1992). The following constitutes the court's findings of fact and

1 conclusions of law pursuant to Fed. R. Bankr. P. 7052.¹

2 **FACTS**

3 On August 16, 2005, the debtor filed a pro se voluntary
4 petition under Chapter 7 of the Bankruptcy Code. Prem Dhawan was
5 appointed interim trustee (the "Dhawan"). The Section 341 Meeting
6 convened on September 23, 2005, the debtor appeared and the meeting
7 was continued to October 14, 2005. The reason for the continuance
8 is not disclosed in Dhawan's Report of § 341 Meeting (Dkt. No. 7).
9 The Section 341 Meeting re-convened on October 14, 2005, the debtor
10 again appeared and the meeting was again continued to November 4,
11 2005. The reason for the second continuance is not disclosed in
12 Dhawan's Report of § 341 Meeting (Dkt. No. 11).

13 On October 19, 2005, the Dhawan filed an application to employ
14 Marshall & Ramos, LLP ("Applicant") as his counsel pursuant to 11
15 U.S.C. § 327(a) (Dkt. No. 8). On October 28, 2005, this court
16 signed and entered an order (the "Employment Order") authorizing
17 the Dhawan to employ Applicant as his counsel (Dkt. No. 12). The
18 Employment Order contained no effective date for Applicant's
19 employment.

20 Sometime after the initial Chapter 7 filing, the debtor
21 retained counsel, and on October 28, 2005, the debtor filed an
22 amended petition listing the case as one under Chapter 13 (Dkt. No.
23 13), together with amended schedules (Dkt. No. 13), a Chapter 13
24 plan (Dkt. No. 14), a motion to value a vehicle (Dkt. No. 14) and a
25

26 ¹ Unless otherwise noted, all statutory references are to the
27 Bankruptcy Code, 11 U.S.C. §101 et seq., and all "Rule" references are
28 to the Federal Rules of Bankruptcy Procedure.

1 substitution of counsel (Dkt. No. 15).

2 On November 1, 2005, the debtor filed a motion to convert the
3 case from Chapter 7 to Chapter 13, and an order converting the case
4 was entered the same day (Dkt. No. 16).

5 On November 6, 2005, Jan P. Johnson was appointed Chapter 13
6 trustee (Dkt. No. 18).

7 On November 10, 2005, Dhawan filed an objection to the
8 debtor's claim of homestead exemption (Dkt. No. 21). On December
9 14, 2005, Dhawan filed an objection to confirmation of the debtor's
10 Chapter 13 plan and a motion to re-convert the case to Chapter 7
11 (Dkt. No. 32). Dhawan's objection and motion were heard on March
12 14, 2006. The case was re-converted to Chapter 7, and Dhawan's
13 objection to confirmation was overruled as moot (Dkt. No. 87). An
14 order on the foregoing matters was signed March 16, 2006 and
15 entered March 20, 2006 (Dkt. No. 93).

16 Dhawan was again appointed interim Chapter 7 trustee on March
17 21, 2006 (Dkt. No. 99). The Section 341 meeting after re-
18 conversion was held on May 12, 2006, the debtor appeared and the
19 meeting was concluded (Dkt. No. 114). No trustee was elected by
20 creditors at the Section 341 meeting, and Dhawan became the Chapter
21 7 trustee.

22 On October 5, 2006, Applicant filed the present request for
23 compensation and reimbursement of expenses (Dkt. No. 124). The Fee
24 Application seeks compensation and reimbursement of expenses for
25 the period October 11, 2005 through November 7, 2006, the date the
26 Fee Application was initially calendared for hearing, equaling
27 \$32,270 in fees and \$1,234.90 in expenses, for a total request of

1 \$33,504.90.

2 The Fee Application thus covers three periods of time: part of
3 the first Chapter 7 period, from October 11, 2005 to November 1,
4 2005 (the "First Period"), the Chapter 13 period, from November 1,
5 2005 to March 20, 2006 (the "Second Period") and part of the second
6 Chapter 7 period, from March 20, 2006 to November 7, 2006 (the
7 "Third Period").

8 The Fee Application was initially calendared for hearing on
9 November 7, 2006. The court continued the Fee Application without
10 oral argument to November 21, 2006 to consider further the numerous
11 papers filed on this matter. The Fee Application came on for
12 hearing on November 21, 2006, after which the court took the matter
13 under submission.

14 15 ANALYSIS

16 As noted above, the Fee Application covers three distinct
17 periods of time. The court will address each separately below.

18 19 THE FIRST PERIOD

20 The court authorized the employment of counsel for the trustee
21 on October 28, 2006. This department follows In re Shirley, 134
22 B.R. 940 (B.A.P. 9th Cir. 1992), which states the rule that
23 professionals are not entitled to compensation from the estate for
24 work done prior to the authorization of their employment. Orders
25 are effective on the date they are entered on the docket by the
26 clerk, unless the court orders a different effective date. Sewell
27 v. MGF Funding, Inc. (In re Sewell), 345 B.R. 174, 180 (9th Cir. BAP

1 2006). Thus, in the absence of an earlier effective date in the
2 order, employment is authorized when the clerk enters the order
3 authorizing employment on the docket. Furthermore, this court is
4 bound by the Ninth Circuit's decision In re THC Financial Corp, 837
5 F.2d 389 (9th Cir. 1988). That decision requires a showing of
6 extraordinary circumstances to justify retroactive employment.
7 This department generally permits the inclusion in an employment
8 order of an effective date up to thirty (30) days before filing
9 (not service) of an application for employment because the
10 administrative requirements associated with obtaining approval of
11 employment justify retroactive approvals of up to that duration
12 without any additional showing of extraordinary circumstances.

13 The employment order does not indicate that the employment was
14 effective as of an earlier date, and no evidence of extraordinary
15 circumstances has been presented to warrant compensation prior to
16 the court's authorization. Applicant seeks compensation during the
17 First Period in the amount of \$2,657 in fees and \$117.14 in costs
18 (\$2,774.14 total). Compensation for services prior to October 28,
19 2006 (\$2,395.00 in fees and \$53.26 in costs) is denied without
20 prejudice. In re Shirley, 134 B.R. 940 (B.A.P. 9th Cir. 1992).
21 During the First Period, the court approves fees and costs totaling
22 \$325.88.

23 THE SECOND PERIOD

24 Applicant is not entitled to compensation from the estate
25 during the Second Period. Fees of \$17,945 and costs of \$641.01
26 (\$18,586.01 total) are disallowed.

1 The court agrees with debtor's reading of In re Rakosi, 99
2 B.R. 47 (Bankr. S.D. Cal. 1989). Conversion of the case to one
3 under chapter 13 divested Dhawan of standing to act on behalf of
4 the estate. See 11 U.S.C. § 348(e). "The effect of a Chapter 13
5 conversion is to divest the Chapter 7 trustee of any authority to
6 act on behalf of the estate in favor of the debtor and/or the
7 Chapter 13 trustee. The Chapter 7 trustee simply has no further
8 capacity or standing to act on behalf of the converted estate as a
9 fiduciary, or to employ professionals to be compensated from the
10 estate." Id. at 50. Dhawan and the professionals employed by him
11 are not entitled to attorney's fees and costs under 11 U.S.C.
12 Section 330 for the period during which this case was one under
13 chapter 13.

14 Applicant's attempt to distinguish Rakosi is unpersuasive.
15 The fact that this case ultimately re-converted to chapter 7 did
16 not authorize Dhawan or his counsel to act on behalf of or to
17 represent the estate during the Second Period.

18 On re-conversion, Dhawan was again appointed interim trustee.
19 See Notice of Appointment on Interim Trustee, Dkt. No. 99.
20 Applicant's pleadings and its comments at oral argument show a
21 misunderstanding of the significance of this fact. This case is
22 not a single contiguous event. The effect of Section 348 on this
23 case is to break it into three distinct time periods. This
24 conclusion is buttressed by the fact that there is no requirement
25 under the Bankruptcy Code or Rules that Dhawan be again appointed
26 as interim trustee on re-conversion to chapter 7. It makes
27 practical sense to re-appoint the first chapter 7 trustee because

1 it eliminates the need to educate a new trustee on the facts of the
2 case, thereby minimizing administrative claims, but there is no
3 requirement that the first chapter 7 trustee be re-appointed.

4 The court is not persuaded by the case cited by Applicant, In
5 re Washington, 232 B.R. 814 (Bankr. S.D. Fla. 1999). That decision
6 relied on an earlier bankruptcy court decision, In re Collins, 210
7 B.R. 538 (Bankr. N.D. Ohio), which awarded fees in similar
8 circumstances based on a theory of *quantum meruit*. However, such
9 an award in this Circuit is foreclosed by In re Shirley, 134 B.R.
10 940, 944 (B.A.P. 9th Cir. 1992) and McCutcheon, Doyle, Brown &
11 Enerson v. Official Committee of Unsecured Creditors (In re
12 Weibel), 176 B.R. 209 (B.A.P. 9th Cir. 1994). State court theories
13 of compensation are preempted by the comprehensive compensation
14 scheme in the Bankruptcy Code.

15 Fees and costs for the Second Period are also unavailable to
16 Applicant under her alternate theory: 11 U.S.C. § 503. Applicant
17 admitted in the Fee Application and at oral argument that the
18 trustee and she were proceeding as creditors based on their own
19 financial interests during the chapter 13 case. This court
20 previously made a finding that they had standing as creditors to
21 move for re-conversion. Section 503(b)(3) permits reimbursement of
22 specified categories of actual, necessary expenses for creditors,
23 custodians, members of creditor's committees, and other specified
24 entities. Section 503(b)(4) permits "reasonable compensation for
25 professional services rendered by an attorney or an accountant of
26 an entity whose expense is allowable under paragraph (3) of this
27 section,..." 11 U.S.C. § 503(b)(4) (West 2005). None of the sub-

1 parts of Section 503(b)(3) applies here. Subsections 503(b)(3)(A),
2 (B), (C), (E) and (F) are clearly inapplicable. While it is clear
3 that Applicant provided a "substantial contribution" during the
4 chapter 13 portion of this case, Subsection 503(b)(3)(D) does not
5 apply because by its terms, it is limited to acts taken in chapters
6 9 or 11. See Rakosi, 99 B.R. at 50-51.

7 Finally, the court finds that fees are unavailable under the
8 more general 11 U.S.C. § 503(b)(1)(A). It is a tenet of statutory
9 construction that the more specific statute governs over the more
10 general when they both address the same subject matter. Morales v.
11 Trans World Airlines, Inc., 504 U.S. 374, 384, 112 S.Ct. 2031,
12 2037, 119 L.Ed.2d 157 (1992); U.S. v. 103 Electronic Gambling
13 Devices, 223 F.3d 1091, 1102 (9th Cir. 2000). To allow attorney's
14 fees to a creditor's counsel under the broader statute would write
15 the limitations imposed by Congress in Sections 503(b)(3) and
16 (b)(4) out of the statute. "Courts should give effect to all parts
17 of a statute, and should not adopt a statutory construction that
18 makes any part of the statute superfluous or meaningless, if that
19 result can be avoided." 3A Norman J. Singer, SUTHERLAND STATUTORY
20 CONSTRUCTION, §70:6 (6th ed. 2006).

21 Based on the foregoing, the debtor's objection regarding those
22 fees and costs incurred during the Second Period is sustained.
23 Fees of \$17,945 and costs of \$641.01 (\$18,586.01 total) are
24 disallowed.

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1 THE THIRD PERIOD

2 Applicant seeks compensation during the Third Period in the
3 amount of \$11,668 in fees and \$476.75 in costs (\$12,144.75 total).
4 These fees and costs are denied without prejudice.

5 As noted above, conversion of the case to chapter 13
6 terminated Dhawan's service as chapter 7 trustee. 11 U.S.C. §
7 348(e). Similarly, when the case converted back to chapter 7, the
8 services of chapter 13 trustee Jan Johnson terminated. On re-
9 conversion to chapter 7, Dhawan was again appointed chapter 7
10 trustee. His appointment, as opposed to another trustee on the
11 panel, was done purely for administrative convenience. As stated
12 above, Dhawan's appointment saved time and resources as compared
13 with a different trustee who would have been required to educate
14 himself or herself on the history and other facts of the case.
15 Dhawan's appointment made practical sense, but the court is aware
16 of no statute or rule requiring his appointment.

17 Because Dhawan is now the trustee, he has the right to employ
18 professionals to be compensated from the estate under Sections 327
19 through 331. But because he is effectively a "new" trustee in the
20 re-converted case, he must comply with employment provisions. The
21 court is aware of no authority permitting counsel employed by the
22 trustee in the initial chapter 7 phase to have their employment
23 orders "wrap around" to cover employment by the trustee in the re-
24 converted chapter 7. Therefore, Applicant was required to re-apply
25 for employment once Dhawan was appointed trustee in the re-
26 converted chapter 7. Applicant failed to obtain re-employment and
27 is therefore not presently employed by chapter 7 trustee.

1 Applicant is therefore not presently entitled to compensation from
2 the estate for the Third Period. In re Shirley, 134 B.R. 940
3 (B.A.P. 9th Cir. 1992). Applicant may re-apply for the fees and
4 costs incurred in the Third Period if it successfully obtains
5 retroactive employment under the standard set forth in In re THC
6 Financial Corp, 837 F.2d 389 (9th Cir. 1988).

7 OTHER OBJECTIONS

8 The balance of debtor's opposition lacks merit. His argument
9 that the August 31, 2006 Stipulation for Dismissal in Adversary
10 Proceeding 05-2444 precludes applicant from seeking approval of
11 certain tasks detailed in this application is unpersuasive. It
12 results from a misunderstanding of the real parties-in-interest in
13 that adversary proceeding. The trustee is the representative of
14 the estate. The settlement provided only that the plaintiff and
15 the estate (through the trustee) would bear their own fees and
16 costs. This compensation motion is part of the process by which
17 the estate bears its own fees and costs. Nothing in the
18 stipulation even remotely implies that the trustee will be required
19 personally to bear the fees and costs of the estate's adversary
20 proceeding against Ms. Chavez. All other objections by debtor have
21 been subsumed by the foregoing.

22 The court declines to reduce applicant's fees further based on
23 the issues raised by The Golden 1 Credit Union in its opposition.
24 The explanation provided by Applicant in her reply sufficiently
25 addresses those issues, and the opposition of The Golden 1 Credit
26 Union is therefore overruled. The court notes that Applicant
27 should separately detail the time billed for attending hearings,

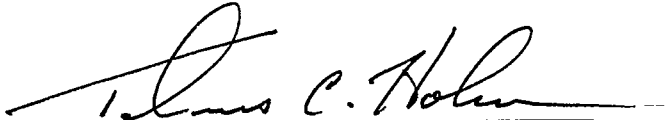
1 the time devoted to preparation and the time devoted to post-
2 hearing memos to file. Such additional detail would avoid
3 questions regarding Applicant's billing practices.

4 **CONCLUSION**

5 For the reasons set forth above, the motion is granted in part
6 and denied in part. The Fee Application is approved for a total of
7 \$325.88 in fees and costs to be paid as an administrative expense
8 by the chapter 7 trustee. As set forth in the First and Final
9 Application, these fees as adjusted above are reasonable
10 compensation for actual, necessary and beneficial services.

11 The court will issue a separate order that satisfies the
12 requirements of Bankruptcy Rule 9021.

13 Dated: DEC 27 2006

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15 THOMAS C. HOLMAN
16 UNITED STATES BANKRUPTCY JUDGE
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

Office of the US Trustee
501 I St. Ste 7-500
SACRAMENTO, CA 95814

Mariam Marshall
350 Frank H Ogawa Plaza
#600
Oakland, CA 94612

Peter Macaluso
910 Florin Rd #111
Sacramento, CA 95831-5259

+

Roxanne Daneri
555 University Ave #114
Sacramento, CA 95825

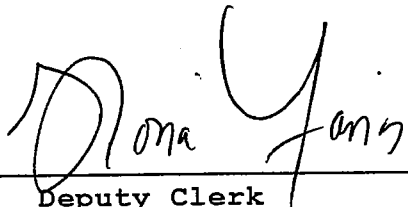
Isaac Chavez
3645 Reel Cir
Sacramento, CA 95832

Prem Dhawan
PO Box 965
Benicia, CA 94510

+

DATED: 12/28/06

By: _____


Deputy Clerk